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THE CONTROL AND ELIMINATION
OF NONCONFORMING USES

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THE CONTROL AND ELIMINATION
OF NONCONFORMING USES

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CHAPTER I

INTRODUCTION

A major problem in modern zoning is that of the non-conforming use. A nonconforming use is one which was in existence at the time of the passage of the zoning ordinance or an amendment thereto and which does not conform with the new use regulations.

Since the need for zoning is not generally recognized until after a mixture of land uses has already occurred, any effort to establish a zoning ordinance to carry out a logical land use plan for a community is almost certain to result in the presence of existing uses which do not conform to the requirements of the district in which they are located. The only possible occasion when this problem would not exist would be when a new town was built on vacant land according to a prescribed plan. This ideal situation is certainly the exception and not the rule.

The legality of regulating private property through zoning was almost continuously challenged in the courts in the early days of zoning. The decision of the United States Supreme Court in the Euclid Village Case definitely established zoning as a constitutional exercise of the police power.¹ Today there is no question that a local government, acting with-

¹Village of Euclid, Ohio v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114 (1926).

in the bounds of state zoning enabling legislation, can regulate the use of private property through zoning. However, provisions for eliminating nonconforming uses still raise serious questions of policy and constitutionality. City planning and zoning officials realize that if the uses of land in an area covered by zoning are ever to be brought into conformity with the land use plan for the area, nonconforming uses must eventually be eliminated.

Leaders in zoning have always sought regulations which would further the public health, safety, morals, and general welfare of the people by bringing about an orderly and planned community with "a place for everything and everything in its place." At the inception of zoning it was recognized that when the boundaries of the various use districts were drawn and the specifications set forth for the uses which could be located in each of the various districts, nonconforming uses would exist. The problem of how to deal with these nonconforming uses came into existence in the United States in 1916 when the first comprehensive zoning ordinance for the City of New York was being drafted.

Practically every community which has undertaken to establish a comprehensive zoning ordinance as a planning tool has found it necessary to cope with nonconforming uses. The fact that nonconforming uses still exist indicates that a satisfactory solution has not been found. The continued trouble produced by nonconforming uses also indicates that

there is need for research on this particular phase of zoning. It is hoped that this thesis will provide an insight which will lead to solutions in addition to those here presented.

It is the purpose of this thesis to set forth and discuss the various methods which have been used to control the change, extension or enlargement, and to secure the elimination of nonconforming uses. The thesis will suggest possible improved methods. As the title indicates, this thesis deals only with nonconforming uses of land and buildings. It is not concerned with nonconformity as it relates to height, area, and other requirements of the zoning ordinance.

Information presented in this thesis was secured by a survey of the literature on the subject, correspondence with professional city planners, a review of approximately 500 zoning ordinances, and an analysis of court cases dealing with the several phases of the problem.

CHAPTER II

THE NONCONFORMING USE PROBLEM

The problems produced by nonconforming uses and the effects of these problems on the community must be understood before regulations can be established to cope with nonconforming uses. Related problems which have a direct bearing on any regulations affecting nonconforming uses will also be discussed.

Approach to the Problem

When considering any problem it is necessary to determine not only the ultimate solution desired but the underlying reasons which make this solution desirable. The basis for any decision is the determining factor as to whether or not the solution will be rational. The problem of nonconforming uses is no exception. A reasonable basis must be established and used as a guide if a valid solution is to be reached.

The approach to the nonconforming use problem may be on either one of two bases. These are the protection of property values or the betterment of the public health, safety, and general welfare.

The desire for property use limitations came from the recognition of a need for orderly urban growth and the realization that residential districts should be protected against offensive uses. Therefore, the idea that zoning would protect property values by prohibiting the mixing of incompatible

land uses has been a convincing argument for zoning.

Zoning regulations are imposed upon private property under the police power and therefore such regulations must be in the general interest if they are to be valid. Property values are not the only values. The general welfare of the entire community must be placed above individual interests. The preservation and stabilization of property values are very important by-products of zoning but this should not be used as a basis for a zoning ordinance.

Nonconforming use provisions are only one aspect of zoning but these provisions should reflect the philosophy of zoning in general. Using the betterment of the public health, safety, and general welfare as the basis for zoning, it is logical to establish a residential district and to prohibit the location of an industrial use in this district. On the same basis, it is justifiable to provide for the removal of an industrial use already existing in this residential district. Although the value of the particular parcel devoted to industrial use might be lowered, the value of all the residential property would be increased and thus the general welfare would be served.

If the improvement of the public health, safety, and general welfare is used as the basis for regulations which have the objective of creating a city in which its inhabitants can live, work, and play in the most wholesome atmosphere possible, the problems of vested rights and the

complaints of individual property owners can be dealt with in a more objective and rational manner.

Relation to the General Plan

Before a zoning ordinance is enacted, there is, or at least there should be, a carefully thought out comprehensive land-use plan for the development of the entire community. This is a necessary prerequisite to the success of zoning. The zoning ordinance itself is simply one of the tools which can be used to bring about the realization of this plan and should be recognized as such. Nonconforming uses are in direct conflict with this comprehensive land-use plan which the zoning ordinance is designed to implement. As long as nonconforming uses exist, the zoning ordinance is falling short of its goal.

If the plans which have been made for the future of the community are to be fully effective, these nonconforming uses will have to be eliminated. After a desirable use for an area has been determined and a zoning ordinance adopted, it is in the public interest to bring all the land within that area up to the standards which have been established as soon as possible. If this is not done the public is deprived of the full benefit of the zoning regulations and the owners of nonconforming uses are given special privileges denied to others in the community.

Harmful Effects of Nonconforming Uses

There must be justification for the imposition of regulations on existing nonconforming uses of private property if support for these regulations is to be expected from the courts. This justification is found in the ill effects which nonconforming uses produce on other properties in the particular vicinity in which they are located, which in turn affects the entire community.

Residential districts.-- Nonconforming uses in a residential district destroy the residential character of the neighborhood. A sprinkling of business or industrial uses in a residential section seriously injures the district. There is no incentive for private citizens or developers to invest in the construction of new houses when the neighborhood has lost its appeal as a desirable residential area. Likewise, perfectly sound structures are not maintained because the owners have probably moved to a new residential neighborhood and are waiting for the opportunity to convert or sell their property for a more profitable use.

This stagnation in the area naturally leads to the lowering of residential property values. If this decline is not arrested in some manner, the area may become seriously blighted or even deteriorate into a slum area. When blight results in the development of slums the entire community suffers due to the disproportionately high cost of community services and loss of taxable values. Although only one of the causes of blight, the contribution of nonconforming uses to

neighborhood decline with the resulting detrimental effect on property values make a strong argument for action to remove nonconforming uses.

Nonconforming uses which attract automotive or truck traffic may not only destroy residential character and lower property values but may be a source of danger to residents of the area. Such establishments as gasoline service stations or drive-in restaurants create points of conflict between pedestrians or children playing on the sidewalk and automotive traffic. Besides being a safety hazard, business and industrial establishments generating a considerable amount of truck traffic may have the additional undesirable effects of producing noise and fumes.

Business and industrial districts.-- Business and industrial uses also feel the effects of incompatible uses. A nonconforming industrial use located in a business district might produce objectional noise or odors and thus discourage further business development.

Although not always nonconforming uses, residential uses in business and industrial districts have a serious effect on business and industrial development. They interrupt business frontage and may make it necessary for the natural expansion of business to by-pass a section of residential property. This resulting mixture is not beneficial to any of the uses concerned.²

²For further discussion of this problem see, City Plan Commission Waukesha, Wisconsin, The Mixture of Business and Residential Apartment Land Use, Report No. 12/53, 1953, 15 p.

In industrial districts the presence of residential uses has the effect of choking the industrial expansion of the city. When a new industry is looking for a place to locate or an existing industry needs room for expansion, they might find it more profitable to seek a location in another city due to the time, cost, and trouble involved in the acquisition of small residential tracts. The complaints of the inhabitants of residences located in industrial areas about the natural consequences of industrial operations will also be a discouraging factor when an industry is making a decision on a plant location.

If the presence of business and industrial uses in a residential district has adverse effects on the inhabitants, which they do, then it naturally follows that residences located in business and industrial districts are subject to an even more undesirable environment. The heavy traffic, noise, glare, fumes, dirt and other characteristics of business and industrial areas are hardly conducive to healthy living conditions. Consequently, there is a trend toward prohibiting residences in these districts. This is logical not only from the standpoint of the effects of business and industry on residences located in these districts but also from the standpoint that suitable areas for these uses are limited, while residences have considerably more freedom in the choice of location. Therefore, the limited area which is suitable for business and industry should be reserved for

these uses.

The undersirable effects of the intermingling of incompatible uses indicate the need for the regulation of nonconforming uses and illustrate the desirability for finding some method which will bring about the eventual elimination of these uses.

Related Problems

If nonconforming use provisions are to be effective there are several related problems which must be resolved. These related problems are use variances, spot zoning, and overzoning. Any one of these problems could be the subject of a complete study, but they will be discussed briefly here since they have a direct effect on any policy affecting nonconforming uses.

Use variances.-- In many localities the granting of use variances by the board of zoning appeals has caused more damage to the ultimate realization of the land-use plan than provisions for the removal of nonconforming uses could repair in many years. A use variance permits the establishment of a use in a district where it is not permitted under the provisions of the zoning ordinance. Thus a use variance creates an incompatible use which is identical with a nonconforming use except for the method by which it is established.

Within the last few years, several cities and at least one state have recognized the effects of use variances and have specifically prohibited the board of zoning appeals from

granting use variances. In this respect the state zoning enabling legislation of the state of New Jersey sets forth very rigid requirements for variances and prohibits use variances.³ The City and County of Denver, Colorado, and the City of Gainesville, Georgia, are among the cities which have prohibited the granting of use variances.

It is clear that any city which intends to take positive steps to eliminate incompatible uses will have to remove from the board of zoning appeals its power to grant use variances. It would not be very logical to initiate proceedings to remove a nonconforming use and at the same time permit the board of zoning appeals to grant a use variance for a similar use on an adjoining lot.

Spot zoning.-- Spot zoning usually takes the form of an amendment to the zoning map by the local legislative body. In most instances these amendments remove land from a more restricted classification and place it in a less restricted zone. This action permits the construction of a use incompatible with its surroundings. Thus a use similar to a nonconforming use is created. This type of zoning amendment is made in response to the desires of individuals rather than on an objective study of the land use needs of the city. Zoning of this sort will eventually bring about the destruction of the comprehensive plan.

³New Jersey Revised Statutes, Section 40:55-39, Amended by Chapter 248, Pamphlet Laws 1953, Approved July 20, 1953.

Spot zoning usually affects the use classification of only a small area and often a single lot. The zoning ordinance of the City and County of Denver, Colorado, has attempted to combat spot zoning of this type by requiring that areas to be included in a zoning amendment be of a prescribed minimum size.⁴ This is a step in the right direction. However, the factor determining the validity of a zoning amendment is not the size of the area but its relation to the comprehensive plan for the development of the community.

Actions by the local legislative body which bear no relation to the comprehensive plan are generally declared illegal by the courts, if they are contested by affected property owners. An excellent statement of the circumstances surrounding spot zoning is found in *Hermann v. Incorporated Village of East Hills*, 104 N. Y. S. 2d 592 (1951), where the court said that spot zoning is the:

...process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such parcel and to the detriment of other land owners.⁵

Spot zoning is a very difficult problem with which to deal. The answer is to have no spot zoning, but elected officials will always be subject to political pressure for spot zones. The amount of this pressure which they can

⁴Zoning Ordinance of the City and County of Denver, Colorado, Codified as of July 1, 1955, Section 2-3.

⁵See James Metzenbaum, The Law of Zoning, 2nd ed. New York: Baker, Voorhis and Company, Inc., 1955, Vol. 1, p. 521.

withstand and the willingness of property owners to contest any spot zones that are created will be the determining factors. Overzoning for business and industry.-- The trend in zoning is to prohibit residences in business and industrial districts. When this is done, overzoning for business and industry causes a large number of residences to be classified as nonconforming uses.

Overzoning has been a fault of almost every zoning ordinance in the United States. Chicago and New York are excellent examples of this practice of providing too much land for business and industry. In 1923, 48.64 square miles were zoned for manufacturing use in Chicago, but in 1936 only 26.57 square miles were being used for this purpose. In 1923, 28.64 square miles were zoned for commercial use, but in 1936 only 12.54 square miles were being used for commercial purposes.⁶

The 1916 zoning ordinance of the City of New York provided enough street frontage for retailing to accommodate almost every store in the entire United States and there was enough area left open to manufacturing to provide work space for 320 million factory and office workers.⁷

The full impact of overzoning is not felt until it is recognized that residences in business and industrial districts are detrimental to the public health, safety, and general

⁶"Amortization of Property Values Not Conforming to Zoning Regulations," University of Chicago Law Review, Vol, 9, April 1942, p. 488.

⁷"New York Rethinks Its City Plan," Architectural Forum, Vol. 93, Sept. 1950, p. 125.

welfare. The recognition of this condition has provided the incentive for many cities to reevaluate their zoning ordinance in the light of the area actually needed to carry on the various activities necessary to the continued prosperity of the city.

Regardless of how good the nonconforming use provisions of a zoning ordinance may be, unless careful attention has been given to the related problems mentioned above, the most carefully planned nonconforming use provisions will fail.

CHAPTER III

REGULATION OF NONCONFORMING USES

The need for regulating nonconforming uses has resulted in the development of several measures to bring about the control and elimination of these uses. Each of these concepts will be discussed and evaluated. In addition, the confusion existing between the relation of the abatement of a nuisance and the elimination of a nonconforming use indicates that a general discussion on the nuisance doctrine would be of value.

Nuisances

Criteria examined by the courts to determine whether or not a given use of property constitutes a nuisance include such things as the character of the neighborhood, the nature of the thing complained of, its proximity to those alleging damage, the frequency and continuity of its operation, the nature and extent of the injury caused, whether or not there are any means of preventing the damage, whether or not the defendant is conducting its operation in the only locality feasible to its success, the importance of the defendant's business to the community, the amount of the defendant's investment, and the length of time that the offending business has existed.⁸

⁸Robert B. Fiske, Jr., "Real Property-The Effect of Zoning Ordinances on the Law of Nuisance," Michigan Law Review, Vol. 54, Dec. 1955, p. 267.

A nuisance may be either public or private. A public nuisance is sometimes referred to as a common nuisance because of the scope of its effects. A public nuisance has been defined as:

...the doing of or failure to do something that injuriously affects the safety, health, or morals of the public, or works some substantial annoyance, inconvenience or injury to the public, and as a nuisance which causes hurt, inconvenience or damage to the public generally or such part of the public as necessarily comes in contact with it.⁹

In contrast to a public nuisance, a private nuisance arises from a use which affects only a limited number of people in the use or enjoyment of their land. A use which is an otherwise lawful business may be a private nuisance.¹⁰

Nuisances may be further divided into nuisances per se and per accidens (in fact). A nuisance per se is defined as, "...an act, occupation or structure which is a nuisance in a given area regardless of its manner of operation, a use of land that cannot be conducted in its present location as to be allowed to exist."¹¹

A nuisance in fact is defined as, "...an act, occupation or structure which is a nuisance only because of its location,

⁹David W. Craig, Pennsylvania Building and Zoning Laws, An Allegheny County Appraisal, 1951, A study conducted by the School of Law of the University of Pittsburgh for the Allegheny Conference on Community Development, p. 131.

¹⁰Fiske, op. cit., p. 268.

¹¹Ibid., p. 268-69.

surroundings, or manner of operation."¹²

The use of nuisance regulations to remove an operation which is not compatible with its surroundings is much older than efforts to eliminate nonconforming uses through zoning. Subject to constitutional limitations, the legislative body has authority to declare anything to be a nuisance which is detrimental to the health, morals, peace, or welfare.¹³ In *Reinman v. City of Little Rock*,¹⁴ the Supreme Court of the United States held that even though a livery stable is not a nuisance per se, it was within the police power:

...to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law, provided this power is not exerted arbitrarily, or with unjust discrimination, so as to infringe upon rights guaranteed by the Fourteenth Amendment.

This background of nuisance law sometimes leads to erroneous results in the interpretation of zoning. The regulation of land use through zoning is not restricted to what is disorderly or offensive. Good zoning enabling acts and ordinances do not even use the word nuisance.¹⁵ Zoning regulations and the doctrine of common law nuisance are

¹²Ibid., p. 268-69.

¹³American Jurisprudence, Vol. 39, Section 12, "Nuisances"; American Jurisprudence, Vol. 37, Section 293, "Municipal Corporations."

¹⁴107 Ark. 174, 237 U. S. 171 (1915).

¹⁵Edward M. Bassett, Zoning: The Laws, Administration and Court Decisions During the First Twenty Years, 2nd ed. New York; Russell Sage Foundation, 1940, p. 93.

completely different types of regulations. If zoning were limited to the common law nuisance doctrine it could not have been effective because it would not have been upheld by the courts due to its broader scope.

A nonconforming use and a nuisance are two different things and are controlled by different methods. A nonconforming use is not necessarily a nuisance, but if this should be the case the city will have no difficulty in obtaining its immediate removal without compensation. The possibility of removing a nonconforming use which qualifies as a nuisance should not be overlooked by the municipality, but it should be understood that requiring the removal of a use as a nuisance is a function of the law of nuisance and not a function of the law of zoning.

Early Regulation of Nonconforming Uses

When zoning was first initiated, the presence of nonconforming uses was recognized as a problem. There appeared to be three possible alternatives for dealing with these uses. Nonconforming uses could be ignored and allowed to continue without interference, they could be required to cease operations and conform immediately, or they could be allowed to continue subject to restrictions. It was decided that the latter would be the best course to follow.

There were probably two primary reasons for adoption of this policy for the handling of existing nonconforming uses.

The first was the great concern of the owners of

nonconforming uses as to the effects of zoning regulations upon their property. At a time when zoning was a new concept and contrary to established traditions of property rights, it was necessary to have all the support that could be mustered. In order not to create the animosity of the large group of owners of nonconforming uses, these people were assured that zoning was not retroactive, and that existing nonconforming uses could be continued subject to minor restrictions.

The second reason for this policy was that, in addition to the need for acceptance by the public, the approval of the courts was required. There was doubt as to whether the general aims and purposes of zoning would be upheld by the courts as a valid exercise of the police power. Therefore, there was little enthusiasm for placing zoning in further jeopardy by requiring the removal of existing uses.

For these reasons, any lawful use which was in existence at the time of the adoption of the zoning ordinance and which did not conform to the requirements for the district in which it was located was designated a nonconforming use and was allowed to continue. There was, however, a desire to bring these nonconforming uses eventually into conformance with the zoning ordinance. To facilitate this, restrictions relating to repairs, expansion, and change of use were placed on existing nonconforming uses and it was left to the passage of time to bring about the removal of these uses. It was

believed that:

...in time the consequence of obliging the change of use in nonconforming buildings to be as far as possible in conformity with the regulations of the use district in which the building is situated will undoubtedly be to "weed out" many of these sporadic uses and thus restore the district to its proper character.¹⁶

The belief that the passage of time would eliminate nonconforming uses has proven to be false. There are several reasons for this which were not foreseen by the early zoning leaders. Probably the principal reason for the continuance of nonconforming uses is that the zoning ordinance places existing nonconforming uses in an entrenched monopolistic position. The owner of a monopoly is not likely to give up this position voluntarily and move to a location where he is in competition with other businesses of the same sort.

Another factor which militates against the voluntary compliance with the requirements of the zoning ordinance is the cost involved in altering structures and changing uses. For example, the owners of a two-family house located in a single-family district will not voluntarily give up the revenue derived from the structure and bear the cost of converting the building to a single-family structure.

Finally, of course, it could not be predicted that there would be a laxity of enforcement and that the practice

¹⁶H. S. Swan, "The Nonconforming Building in Zoning," American Architect, Vol. 114, Nov. 3, 1918, p. 592.

of granting use variances by the zoning board of appeals would be so abused as to increase the number of de facto non-conforming uses.

Thus, the history of nonconforming uses has proven that the early proponents of zoning were over optimistic with regard to their policies for the eventual elimination of non-conforming uses.

Present Regulations

Local governments that desire to pass zoning regulations must look to their state government for power to do so. Provisions contained in the zoning regulations of local governments can not exceed the authorization of the state enabling act. Thus the enabling legislation has a great influence on what measures local governments may take affecting existing nonconforming uses. The zoning enabling legislation of some states specifically prescribes how nonconforming uses shall be dealt with, some state enabling legislation is silent on the subject of existing nonconforming uses, and some states have authorized local governments to provide for the removal of these uses.¹⁷

The Massachusetts zoning enabling act is an example of legislation which specifically provides how existing uses

¹⁷For a summary of zoning enabling legislation of all states see: United States Housing and Home Finance Agency, Comparative Digest of Municipal and County Zoning Enabling Statutes, Oct. 1952, 70p.

will be treated. This act carries the following provision:

Except as provided in section eleven (provides that building permits issued prior to passage of zoning ordinance for construction of buildings must be acted upon within 6 months after the passage of the ordinance and dilligently executed to completion), a zoning ordinance or by-law or any amendment thereof shall not apply to existing buildings or structures, nor to the existing use of any building or structure, or of land to the extent to which it is used at the time of adoption of the ordinance or by-law, but it shall apply to any change of use thereof and to any alteration of a building or structure when the same would amount to reconstruction, extension or structural change, and to any alteration of a building or structure to provide for its use for a purpose or in a manner substantially different from the use to which it was put before the alteration, or for its use for the same purpose to a substantially greater extent. Such an ordinance or by-law may regulate non-use of nonconforming buildings and structures so as not to unduly prolong the life of nonconforming uses; provided, that no such ordinance or by-law shall so regulate the non-use of nonconforming land used for agriculture, horticulture or floriculture where such non-use has existed for less than five years.¹⁸

The standard zoning enabling act prepared by the United States Department of Commerce does not prohibit retroactive regulations. This type of enabling act leaves the decision of how to deal with existing uses up to the local authority. The local government can then develop regulations that will best suit their individual needs. Concerning this type of

¹⁸Massachusetts Acts of 1954, Chapter 368, Amended by Chapter 40A, effective August 1, 1954, Section 5.

state enabling legislation, Bassett said:

State legislatures ought not to prevent municipalities from using zoning regulations retroactively. The future development of zoning may show that this power to oust existing nonconforming buildings and uses in certain cases is most important.¹⁹

Some state zoning enabling acts specifically authorize local governments to adopt zoning regulations containing provisions for the removal of nonconforming uses. Such an enabling act is the Pennsylvania County Zoning Act of 1937, a section of which reads:

The board of county commissioners may in any zoning ordinance provide for the termination of nonconforming uses, either by specifying the period or periods in which nonconforming uses shall be required to cease, or by providing a formula or formulae whereby the compulsory termination of a nonconforming use may be so fixed as to allow for the recovery or amortization of the investment in the nonconformance.²⁰

Although based on different enabling legislation, the nonconforming use provisions of zoning ordinances have changed very little during the history of zoning. With the exception of recent provisions relating to amortization and eminent domain which have been included in some of the more recent zoning ordinances, the methods of dealing with nonconforming uses have remained substantially the same

¹⁹Bassett, op. cit., p. 116.

²⁰Craig, op. cit., p. 235.

throughout the United States. A typical section relating to the treatment of nonconforming uses is found in the Dayton, Ohio, zoning ordinance which reads:

(a) Any building or use existing at the time of enactment of this ordinance may be continued, even though such building or use does not conform with the provisions of this ordinance for the district in which it is located.

(b) Such existing nonconforming use may be hereafter extended throughout those parts of a building which were manifestly arranged or designed for such use at the time of enactment of this ordinance.

(c) No building or premises containing a nonconforming use shall hereafter be extended unless such extension shall conform with the provisions of this ordinance for the district in which it is located except as otherwise provided in this ordinance.

(d) No building or premises where a nonconforming use is discontinued for more than two years or is superseded by a use permitted in the district in which it is located shall again be devoted to any use prohibited in such district.

(e) Any nonconforming building damaged more than 75% of its fair market value above the foundations at the time of damage by flood, fire, explosion, earthquake, war, riot, or act of God or man shall not be reconstructed and used as before such a calamity, but if less than 75% damaged it may be reconstructed or used provided that it be done within 12 months of such calamity.

(f) Nothing in this ordinance shall prevent the strengthening or restoring to a safe condition any part of any building declared unsafe by the Department of Building, or from complying with its lawful requirements.²¹

²¹ Building Zone Ordinance for the City of Dayton, Ohio, as amended to July 6, 1949, Section 210.

A nonconforming use may be a use of land only, a nonconforming use of a conforming building, or a nonconforming use of a nonconforming building. Some of the later ordinances recognize the difference between these and have separate provisions relating to each. However, many ordinances make no differentiation and refer to "use or structure" in the same regulation.

In order to qualify as a nonconforming use, the use must be in existence at the time of the passage of the ordinance. On the date the zoning ordinance or amendment is to become effective there may be a building under construction or perhaps only a permit may have been issued for the construction of a building. This presents a problem which each zoning authority must work out to its own satisfaction. These situations have been handled in various ways. The zoning ordinance may specify the amount of work which must have been accomplished for the structure to be considered a nonconforming use. This may vary from the drawing of the plans, ordering the material, pouring the footings, or the completion of a specified amount of construction. Generally, however, the zoning ordinance will provide that if a permit has been secured, the building may be completed subject to a time limitation during which the construction must be finished.

The validity of these provisions is uncertain and the law does not seem to be settled on this point. Courts in dif-

ferent states appear to make different rulings.²²

The mere intention to establish a nonconforming use is not sufficient to qualify a use as a legal nonconforming use. On this matter, the Connecticut court in the case of *DeFelice et al. v. Zoning Board of Appeals of Town of East Haven et al.*, 130 Conn. 156, 32 A. 2d 635 (1943), ruled that:

Courts are not required to speculate as to the number of acts or business transactions necessary to constitute an existing use, but an 'existing use' means utilization of the premises ...the use need not be in actual operation when the regulations take effect, nor is it essential that, as exercised, it shall have utilized the entire tract, but actual use as distinguished from merely contemplated use is required.²³

Likewise the ability to use a structure in a nonconforming manner does not make it a nonconforming use subject to protection as such. A recent case on this point was decided by the Supreme Court of Georgia. This was the case of *Tucker et al. v. City of Atlanta*, 211 Ga. 157, 84 S. E. 2d 362 (1954). In this instance the owners of a large residence located in a single-family residential district of the City of Atlanta converted it to multi-family use after the passage of the zoning ordinance. The owners contended that because it was a large residence susceptible to multi-family use, they had a nonconforming use, even though the property had been used

²²*Bassett, op. cit.*, p.108.

²³*Metzenbaum, op. cit.*, Vol. 2, p. 1213.

for single-family use after the adoption of the zoning ordinance.

The court said:

The contentions of the plaintiffs in error seem to be that, since at all times the construction and arrangement of the house had been such that it could have been converted into apartments, it was for this reason not subject to the provisions of the zoning ordinance, even though at the time the ordinances were passed the property was being used as a one family residence and had never been otherwise used until the Tuckers divided the house into apartments.

The court answered this, saying in part:

Such a construction would have the effect of destroying one family zoning restrictions because there are few homes that could not be converted into apartments of some size. . . .²⁴

Provisions for Control

The objective of zoning ordinances is to restrict rather than to increase nonconforming uses. Provisions which have been used to facilitate this objective include change of use, extension and structural alteration. Each of these will be discussed in detail.

Change of Use

Most zoning ordinances provide that a nonconforming use may be changed to a use of the same or higher classification, and once a use has been changed to a higher or a

²⁴American Society of Planning Officials, Zoning Digest, Vol. 7, Feb. 1955, p. 29-30.

conforming use, it shall not again be changed back to a lower or nonconforming use. This practice of allowing a nonconforming use to be changed to a use of the same or higher classification appears to be unnecessarily lenient and could hardly be expected to bring a nonconforming use into conformance with the zoning ordinance within a short period of time. Some ordinances provide that a nonconforming use may be changed but only to a higher or a conforming use. The intent of such a provision is to invite an improvement in the character of the nonconforming use during its continued existence, but this is a very weak control because a lower classification use could be upgraded through the entire range of uses of higher classifications.

Many of the later ordinances prohibit the change of a nonconforming use to any except a conforming use. This appears to be a more logical regulation and would certainly be more in line with the policy of restricting such uses. Provisions of this type have been upheld in numerous instances by the courts.²⁵

Occasionally, zoning ordinances leave the decision concerning the change of a nonconforming use to the zoning board of appeals with the stipulation that a change which is permitted shall be no more detrimental to the neighborhood

²⁵Eugene McQuillin, The Law of Municipal Corporation, 3rd ed. Chicago; Callaghan & Company, 1950, Vol. 8, Sec. 25.202, p. 389, n. 90.

than the use it is to supersede. This is contrary to good zoning policy and is subject to the same criticism as provisions which permit the zoning board of appeals to grant use variances. An example of the abuse of this power is found in the case of *Baggs v. Zoning Board of Review of Town of Barrington*, 79 R. I. 211, 86 A. 2d 658 (1952). In this case the court held that the ordinance empowering the zoning board of review to authorize the change of a nonconforming use to one no more harmful or objectionable only permits the granting of a substituted new nonconforming use and not an additional nonconforming use. Therefore, the decision of the board in permitting a proposed light manufacturing use in the rear portion of a building in a residential district, in addition to continuing the nonconforming use of an automobile garage and service station in the front portion of the building, was void as beyond the limits of the grant of power under the ordinance.²⁶

Extension

Provisions relating to the extension of nonconforming uses vary considerably in different cities. The extension of nonconforming land uses is treated in several ways. Some zoning ordinances do not mention the extension of nonconforming land uses while others provide that they shall not be

²⁶Ibid, 1955 Cumulative Supplement, p. 171.

expanded either on the same or adjoining property. Some zoning ordinances provide that an extension of a nonconforming land use may be authorized by the zoning board of appeals or the city council.

Particular difficulty is encountered in dealing with land uses such as quarries. These often involve a large area much of which may not have been excavated at the time of the passage of the ordinance. The courts look to the provisions of the ordinance which deal with such uses and if these are reasonable they will be upheld. In *Town of Billerica v. Quinn*, 320 Mass. 687, 71 N. E. 2d 235 (1947), the court recognized the problem which these uses present and stated:

It is plain that the Legislature intended that existing uses should be preserved. It is equally plain that under the statute and the by-law they are not to be extended. The difficulty comes in reconciling these propositions where the use consists in stripping loam for sale, and where no more loam can be stripped without extending the denuded area beyond its existing boundaries. Nothing in the statute or by-law indicates a legislative intent to subordinate the zoning principle in favor of existing uses of such a character that they cannot be continued without extending them. The exception in favor of an existing use is expressly limited by the statutory words 'To the extent to which it was used at the time of adoption of the ordinance or by-law.' A use which cannot be so limited is not within the exception and is not preserved at all.²⁷

In the case of *Town of Burlington v. Dunn*, 318 Mass.

²⁷Metzenbaum, *op. cit.*, Vol. 2, p. 1447; see also *Town of Wayland v. Lee et al.*, 331 Mass. 550, 120 N. E. 2d 641 (1954).

216, 61 N. E. 2d 243 (1945), it was held that permitting the owner to remove top soil to such an extent as to get at and remove gravel in the location of a gravel pit as it existed at the time the ordinance was adopted does not constitute an illegal extension.²⁸

The operation of nonconforming quarrying business at the time of the passage of the zoning ordinance was held in *Struyk v. Samuel Braen's Sons*, 17 N. J. Super. 1, 85 A. 2d 279, not to authorize an extension of the quarrying operations to an adjoining tract which was purchased after the zoning ordinance was passed.²⁹

A city which is about to adopt a zoning ordinance which will involve classifying a quarrying operation as a nonconforming use should recognize the particular problems which these uses present and make provisions in the ordinance for dealing with these operations. It is suggested that an equitable provision would be to allow a specified amount of extension.

There are also a variety of provisions relating to the extension of the nonconforming use of buildings. The zoning ordinance may provide that a nonconforming use shall not be extended at the expense of a conforming use, that it may not be expanded or extended into any portion of a con-

²⁸McQuillin, op. cit., p. 399-400.

²⁹Yokeley, op. cit., p. 375-76.

forming building, that it may not be extended at all, or that it may be extended to a certain percentage of the area presently occupied. These differences in the applicable ordinances, and in the situations involved in the various cases have led the courts to different conclusions concerning the right to extend or enlarge a nonconforming use.³⁰

In the case of *Mercer Lumber Companies v. Village of Glencoe*, 309 Ill. 138, 60 N. E. 2d 913 (1945), it was said that the power to regulate a nonconforming use includes the power to limit the extension of it.³¹ Justice Roman in his opinion in *Everpure Ice Mfg. Co. v. Board*, 324 Mass. 433, 86 N. E. 2d 906 (1949), said:

One of the main purposes of zoning is to stabilize use of property, and the advantages that owners of nonconforming property acquire by enactment of a zoning ordinance are not to be subsequently augmented unless permitted by the ordinance.³²

If nonconforming uses are allowed to be enlarged and extended it is difficult to see how the underlying policy of zoning which is to restrict and ultimately abolish nonconforming uses is ever to be accomplished.

³⁰For a discussion of cases relating to various types of extension provisions see, M. A. Leffingwell, "Zoning: Changes, After Adoption of Zoning Regulations, in Respect to Nonconforming Uses," American Law Reports Annotated, Vol. 147 (1943), p. 168-173.

³¹McQuillin, op. cit., p. 397.

³²Metzenbaum, op. cit., Vol. 2, p. 1226.

Structural Alteration

Most ordinances provide that a nonconforming building may not be structurally altered except to convert it to a conforming use. The problem involved is the determination of what constitutes a structural alteration. In *Goodrich v. Selligman*, 298 Ky. 863, 183 S. W. 2d 625 (1944), in quoting from *Carrithers v. Louisville*, 250 Ky. 462, 63 S. W. 2d 493, the court said:

'Structural alterations' intended to be prohibited by the zoning ordinance are the changing of an old building in such a way as to convert it into a new or substantially different structure.³³

In the case of *Selligman v. Von Allmen*, 207 Ky. 121, 179 S. W. 207 (1944), the court held that the replacement of decayed wooden walls by brick walls constituted a structural alteration. However, in direct opposition to this, the Supreme Court of Iowa in *Granger v. Board of Adjustment of the City of Des Moines*, 241 Ia. 1356, 44 N. W. 2d 399 (1950), held that the replacement of existing walls with concrete and steel did not constitute a structural alteration. In this case the term "structural alteration" was defined as such an alteration that would convert an existing structure into a different one, and not such as would make any reasonable repair of the building due to depreciation and deterioration.

³³E. C. Yokley, Zoning Law and Practice, 2nd ed. Charlottesville, Virginia: The Michie Company Law Publishers, 1953, Vol. 1, p. 385.

However, it was held in *Cole v. Battle Creek*, 298 Mich. 98, 298 N. W. 466 (1941), that the test of the increase or decrease of a nonconforming use through a change in a building was whether an existing nonconforming use was extended and the life of the existing nonconforming building prolonged.³⁴

This seems to be a more reasonable construction of a structural alteration and is more in harmony with the purpose of eventual elimination of nonconforming uses.

Provisions for Termination

The desirability of doing away with nonconforming uses has led to the inclusion of some provisions to help bring about the eventual elimination of these uses. These provisions relate to the discontinuance, abandonment, and destruction of a nonconforming use.

Discontinuance

Zoning ordinances generally provide that if a nonconforming use is discontinued for a specified period of time, any future use must be in conformity with the provisions of the ordinance. The time of discontinuance usually specified ranges from one to three years. The rationale behind this provision is that when the owner has voluntarily ceased to exploit the nonconforming use, it is not unreasonable to

³⁴For further discussion of this point see, Leffingwell, op. cit., p. 175.

require that any future use shall conform to the provisions of the zoning ordinance.³⁵

It appears to be settled that provisions prohibiting the resumption of a nonconforming use after a specified period of nonuse is a valid restriction.³⁶ The language of the ordinance is an important consideration when it is being contested in the courts. Therefore, these provisions should be clear and concise.

Abandonment

Due to the language of some zoning ordinances abandonment has been confused with discontinuance in many cases. As distinguished from discontinuance, abandonment is the cessation of a nonconforming use with no intention to resume this use. In the case of *Longo et al. v. Eiders et al.*, 93 N. Y. S. 2d 517 (1949), in which it was held that a speed drome had been abandoned, the court said:

The general rule is that the right of a property owner to continue a nonconforming use may be lost through abandonment of such use. An abandonment within the meaning of such rules connotes a voluntary affirmative completed act. It means something

³⁵"Nonconforming Uses: A Rationale and an Approach," University of Pennsylvania Law Review, Vol. 102, Nov. 1953, p. 100.

³⁶"Zoning-Discontinuance of Nonconforming Use", Miami Law Quarterly, Vol. 6, Dec. 1951, p. 135-138; C. T. Drecheler "Zoning-Resuming Nonconforming Use," American Law Reports Annotated, Vol. 18, 2nd Series, 1951, p. 725-755.

more than a mere suspension, a temporary non-occupancy of a building or a temporary cessation of business.³⁷

Proof that there was an intention to abandon a use is often very difficult to obtain. However, there are several actions which may constitute abandonment. The change of a nonconforming use to another nonconforming use or to a conforming use constitutes an abandonment of the original use. Although time is not an essential element, the lapse of a considerable period of time during which there has been a cessation of the use may also be used as evidence of abandonment. In the case of *Binghamton v. Gartell*, 90 N. Y. S. 2d 556 (1949), the court held:

Abandonment in law depends upon the concurrence of two and only two factors; one, an intention to abandon or relinquish; and two, some overt act or some failure to act, which carries the implication that owner neither claims nor retains any interest in the subject matter of the abandonment.³⁸

Destruction

Provisions regulating the reconstruction of a nonconforming building which has been destroyed by fire, flood, hurricane, or other act of God are usually included in the ordinance. If a building is destroyed to a certain per cent of

³⁷American Society of Planning Officials, Zoning Digest, Vol. 2, p. 43,44.

³⁸Metzenbaum, op. cit., p. 1265.

its value it may not be rebuilt except in conformity with the ordinance. Requirements as to the per cent of destruction necessary before a building may not be rebuilt range from 50 to 100 per cent. Such provisions have been held to be a valid and constitutional exercise of the police power.³⁹

The courts have generally held that all the foregoing regulations for the control and termination of nonconforming uses are a proper exercise of the police power. Reasonableness is the determining factor and each case must be decided on the reasonableness of the regulation in view of the facts in each particular case.

Recent Concepts

The above provisions relating to the control and termination of nonconforming uses have proven to be slow and ineffective in bringing about the ultimate removal of these uses. It has been recognized by some city planning and zoning officials for many years that some more effective methods must be found for dealing with nonconforming uses. In 1938, Harland Bartholomew wrote:

It has always been assumed that nonconforming uses would gradually eliminate themselves from the districts in which they exist if they were not permitted to expand. Such has not proven to be the case. They not merely continue to exist, but to send down deeper roots. They become clear monopolies and special privileges. Their existence is a continual threat to the conservation

³⁹ Ibid., p. 1437-1445; McQuillin, op. cit., p. 383.

of property values in the districts wherein they exist. The time has come when cognizance should be taken of this situation and provision made, probably in the state law, whereby nonconforming uses may be eliminated gradually under some equitable method of procedure.⁴⁰

Concerning the elimination of nonconforming uses,

Edward M. Bassett said:

There is little doubt that under zoning ordinances municipalities if they wish, can succeed in ousting nonconforming uses and buildings. If the police power can be invoked to prevent new nonconforming buildings because of its relation to the community health, safety, moral, convenience, and general welfare, it follows that the police power can be invoked to oust existing nonconforming uses.⁴¹

In order to speed up the elimination of nonconforming uses additional methods have been devised. These include the use of amortization, eminent domain and performance standards.

Amortization

To bring about the eventual elimination of nonconforming uses a method was needed which would bring all the uses in a district into conformity with the provisions of that district and still take into consideration the vested right of the owners of nonconforming property. To meet these needs several cities have adopted time limitation provisions commonly referred to as amortization provisions, although

⁴⁰Harland Bartholomew, "The Zoning of Illinois Municipalities," Illinois Municipal Review, Vol. 17, (1938), p. 232.

⁴¹Bassett, op. cit., p. 112.

the term is not a strictly accurate one. Under these provisions, nonconforming uses are permitted to continue but only for a specified time. At the end of this time these nonconforming uses must be brought into conformity with the provisions of the zoning ordinance.

The period of time for which a nonconforming use is allowed to continue is dependent upon the permanency of the facilities. A nonconforming use involving a use of land only (or a temporary structure, such as a billboard) is required to conform within a shorter period of time after the passage of the zoning ordinance (or an amendment thereto) than a use which involves a structure of a more permanent nature. The reasoning here is that the investment in a use of land is not as great as the investment in a permanent structure and therefore a shorter period of amortization is justified.

The theory of amortization is that it is not unreasonable to require a nonconforming use to be discontinued at the end of a specified time since during that time it has a monopolistic position which, if properly exploited, sufficiently compensates for the eventual cost of conformance.⁴²

Amortization is contrary to the concept that the owner of a nonconforming use has acquired a vested right which he

⁴²"Nonconforming Uses: A Rationale and an Approach," University of Pennsylvania Law Review, Vol. 102, Nov. 1953, p. 101.

is entitled to exploit as long as he sees fit to do so. In reference to the vested right principle, a report by the California Roadside Council says:

A nonconforming use has not established a vested right by which it must remain forever in its location unless it is destroyed or abandoned. The only right which a nonconforming use has (if it is not a nuisance per se and subject to abatement as such) is the right to the reasonable enjoyment of the investment which it represents. That right is protected if the nonconforming use is allowed to continue for a reasonable time during which the investment may be amortized, before it is required to move.⁴³

Amortization has been summed up by one writer in the following manner:

Amortization of nonconforming uses is fair. The useful life of the building or use to which the premises are devoted is determined and the owner has that length of time to conform. The loss he suffers, if any, is spread out over a period of years, and he further enjoys a monopolistic position by virtue of the zoning ordinance as long as he remains.⁴⁴

Provisions requiring amortization of nonconforming uses will be discussed as they relate to the nonconforming use of land and the nonconforming use of buildings. Court decisions relating to provisions which require termination of nonconforming uses will also be discussed.

Nonconforming use of land.-- The time periods which have been established for the elimination of the nonconforming use of

⁴³California Roadside Council, Retroactive Zoning-The Legal Principal and Its Application, 1944, p. 7.

⁴⁴Koegal, William F, "Elimination of Nonconforming Uses," Virginia Law Review, Vol. 35, April 1949, p. 357.

land vary in different cities from two to five years in most cases. Uses which would be affected by this provision include such things as car lots, the use of land for storage purposes, parking lots or any use which is not housed in a building or does not involve a structure.

Buildings which are incidental to the use of land and do not represent a substantial investment are usually required to be removed in the same length of time as the nonconforming use of land. Provisions for the amortization of nonconforming billboards are often contained in this section of the ordinance. However, some zoning ordinances refer to nonconforming billboards in a separate section, although their elimination is usually required within the same length of time as a nonconforming use of land.

A typical provision for the amortization of nonconforming uses of land is found in the Bakersfield, California, zoning ordinance which provides:

Every nonconforming use of land (where no main building is involved) existing at the time this ordinance becomes effective shall be discontinued within three (3) years from the effective date of this ordinance.⁴⁵

A proposed amendment to the Chicago Zoning Ordinance deals with the nonconforming uses of land in a slightly dif-

⁴⁵Zoning Regulation Ordinance, No. 1010, New Series, City of Bakersfield, California, Section 17-05-G.

ferent manner. It provides that all nonconforming uses of land where no structures are employed in connection with such use or where the only buildings or structures or other physical improvements employed are accessory or incidental to such use or have an appraised valuation of less than \$2,000 shall be discontinued within two years from the adoption of the ordinance or amendment thereto.⁴⁶

The Los Angeles zoning ordinance discusses nonconforming signs and billboards under the section dealing with the nonconforming use of land. It provides that:

Any sign, billboard, commercial advertising structure or statuary which lawfully existed and was maintained at the time this Article became effective, may be continued, although such structures do not conform to all the provisions thereof; provided that no structural alterations are made thereto and that all such nonconforming signs, billboards, commercial advertising structures and statuary and their supporting members shall be completely removed from the premises not later than five (5) years from the effective date of this Article.⁴⁷

Nonconforming use of a conforming building.-- In recent years some ordinances have made a distinction between a nonconforming use operated in a conforming building and a nonconforming building. The reason for the differentiation is that the investment in the former is usually smaller

⁴⁶Proposed Comprehensive Amendment to the Chicago Zoning Ordinance, October, 1955, Article 6, Section 6.6-4.

⁴⁷Comprehensive Zoning Plan, City of Los Angeles, 1952, Section 12.23,C-3.

than in the latter and the inconvenience to the property owner is less due to the fact that the only change required is a change in use.

The zoning ordinance of the City of Hanford, Kings County, California, stipulates that all nonconforming uses of conforming buildings shall be discontinued not later than three years from the effective date of the ordinance. Durham, North Carolina, has a similar provision but the time limit is five years.

Section 12.23,B.1.a. of the Los Angeles zoning ordinance provides:

The nonconforming use of a conforming building or structure may be continued, except that in the 'R' Zones any nonconforming commercial or industrial use of a residential building shall be discontinued within five (5) years from June 1, 1946 or five (5) years from the date the use becomes nonconforming whichever date is later.

This section was upheld in the case of Los Angeles v. Gage which will be discussed later.

Nonconforming buildings.-- Many of the cities which use amortization provisions make no distinction between a nonconforming use of a conforming building and that of a nonconforming building. Periods for amortization of the investment and the elimination of the nonconforming use or structure are usually computed from either the date of the issuance of the building permit or from the date of the passage of the ordinance.

The City of Alhamba, California, is an example of a city which computes the amortization period according to the age of the building. The zoning ordinance provides that nonconforming buildings located in residential zones shall be removed when such structures reach the age of forty years, computed from the date the building was erected. The zoning ordinance of University City, Missouri, makes a further refinement by specifying different time periods for the different types of construction as set forth in the building code. In the case of buildings defined in the city building code as class 4 (frame or unprotected metal), 20 years are allowed; class 3 (masonry with wood roof and wood stud partitions), 30 years; class 2 (masonry, of heavy timber construction or slow burning or semi-fireproof construction) 40 years; and class 1 (fireproof) 50 years. Both of these zoning ordinances provide that these regulations shall not become operative until 10 years from the time the ordinance is adopted. This means that, regardless of its age, a nonconforming building can remain for at least 10 years. The principal difficulty with this type of provision is that it is often difficult to determine the exact age of a building, especially if the city has not kept accurate records of building permits issued, or building permits have not been required.

The zoning ordinances of Chicago Heights, Illinois, and Gainesville, Georgia, are examples of ordinances which provide that nonconforming buildings shall be discontinued a

specified time after the passage of the ordinance. The Chicago Heights ordinance provides that nonconforming buildings of frame or wood construction shall be removed or changed to a conforming use within 15 years and buildings of steel or masonry construction shall be removed or changed to a conforming use within 25 years. The Gainesville, Georgia, zoning ordinance provides 10 years in the case of frame, one-story block or light metal structures and 25 years for all others.

Time provisions based either on the age of the structure or the date of the passage of the zoning ordinance may not be wholly equitable. The age of a building does not necessarily reflect the worth of the structure. The initial skill with which the building was constructed and continued proper maintenance could make a building which is fifty years old more valuable than a building of the same type construction half this age which was either not well constructed or properly maintained. Likewise, a provision stipulating that nonconforming buildings must be discontinued within a specified time after the passage of the ordinance based on the type of construction, makes no differentiation between a grocery store of masonry construction and a light manufacturing concern of the same type of construction, although the investment involved may be very different. A better method might be to base time provisions on the value of the building or structure. This method will be explained more fully in

the following chapter.

Most of the provisions requiring discontinuance of nonconforming buildings refer to business and industrial buildings located in residential districts. Of equal importance is the protection of business and industrial areas from encroachment by residential development. More recent zoning ordinances have taken this into consideration and prohibited residential development in some areas and provided for the removal of existing residences. The City of Los Angeles has placed restrictions on nonconforming residential uses and the proposed zoning ordinance for the City of Chicago provides for the amortization of nonconforming residences. The proposed Chicago ordinance, however, stipulates that if the residence is occupied by the owner at the end of the amortization period it shall be exempt from this regulation. This provision of owner occupancy, while it is a reasonable and desirable provision, will probably serve to defeat the elimination of nonconforming residences. In many instances the residences which would be nonconforming are already slum property. In these cases, assuming a ten year amortization period, there will be a temptation for a slum owner to rent his property for nine years and six months and then sell the property to the occupant and continue to collect payment for five or ten more years. A better method might be to provide that all nonconforming residences occupied by the owner at the time of passage of

the ordinance would be exempt from this requirement of the ordinance as long as the owner continued to reside in the residence. A provision such as this, coupled with a requirement for the renewal of an occupancy permit each year, should be more effective in eliminating nonconforming residences in business and industrial areas.

Court decisions relating to amortization.-- The court cases dealing with amortization provisions indicate a favorable trend. It has been predicted that the question of gradual elimination of nonconforming uses without compensation will sooner or later go before the United States Supreme Court and will occupy a niche in zoning as high as that held by case of *The Village of Euclid v. Ambler Realty Co.*⁴⁸

Ordinances which require nonconforming uses of land to be terminated within a specified period of time do not appear to have been contested in many cases. Provisions requiring the elimination of nonconforming land uses were upheld in *Edmonds v. Los Angeles County*, 40 Cal. 2d 903, 255 P. 2d 781 (1953), and *City of Dallas v. Coffin et ux.*, 254 S. W. 2d 203 (Texas, 1953). Both of these cases involved nonconforming trailer camps. However, in the case of *Town of Somers v. Camars et al.*, 308 N. Y. 537, 127 N. E. 2d 327

⁴⁸Richard F. Babcock, "Emerging Legal Issues in Zoning," Proceedings of the Annual National Planning Conference, Philadelphia, Pennsylvania, Sept. 26-30, 1954, p. 137.

(1955), the court held that an amendment to the zoning ordinance stipulating that the provision that nonconforming uses could be continued for 20 years no longer applied to any "natural products uses" was unconstitutional as it applied to the defendants right to continue to remove gravel and sand as a legal nonconforming use. It should be noted that these restrictions applied to only one type of use and not equally to all uses of land.

The outstanding case with respect to a time limitation on the nonconforming use of a conforming building is a recent California decision. The case of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P. 2d 34, (1954), upheld the provision of the Los Angeles zoning ordinance requiring a nonconforming use of a conforming building to be removed within five years. The property involved in this case was a retail and wholesale plumbing establishment which was operated in a residence and utilized outdoor racks, bins and stalls for the storage of material.

In pointing out that this seemed to be a logical and reasonable method of dealing with nonconforming uses the court said:

In essence there is no distinction between requiring the discontinuance of a nonconforming use within a reasonable period and provisions which deny the right to add to or extend buildings devoted to an existing nonconforming use, which deny the right to extend or enlarge an existing nonconforming use, which deny the right to substitute new buildings for those devoted to an existing nonconforming use-all of which have been held to be

valid exercises of the police power. . . . The distinction between an ordinance restricting future uses and one requiring the termination of the present uses within a reasonable period of time is merely one of degree, and constitutionality depends on the relative importance to be given to the public gain and to the private loss. Zoning as it affects every piece of property is to some extent retroactive in that it applies to property already owned at the time of the effective date of the ordinance. The elimination of existing uses within a reasonable time does not amount to a taking of property nor does it necessarily restrict the use of property so that it cannot be used for any reasonable purpose. Use of a reasonable amortization scheme provides an equitable means of reconciliation of the conflicting interests in satisfaction of due process requirements. As a method of eliminating existing nonconforming uses it allows the owner of the nonconforming use, by affording an opportunity to make new plans, at least partially to offset any loss he might suffer. The loss he suffers if any is spread out over a period of years, and he enjoys a monopolistic position by virtue of the zoning ordinance as long as he remains. If the amortization period is reasonable the loss to the owner may be small when compared to the benefit to the public. Nonconforming uses will eventually be eliminated. A legislative body may well conclude that the beneficial effect on the community of the eventual elimination of all nonconforming uses by a reasonable amortization plan more than offsets individual losses.

Probably the earliest cases dealing with the elimination of nonconforming uses of nonconforming buildings are the well known Dema Realty Cases.⁴⁹ The ordinance in question in these cases created a residence district and required established businesses to be removed within one year. The property involved in these cases was a drug store and a

⁴⁹State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613, Cert. denied, 280 U. S. 556 (1929), and State ex rel. Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314.

grocery store. In upholding this ordinance as constitutional in the McDonald case, the court referred to the Euclid Village Case which held that it was not arbitrary and unreasonable for a village to create and maintain a purely residential district. The Louisiana court said:

It follows necessarily that the village was vested with the authority to remove any business or trade from the district and to fix a limit of time in which the same shall be done.

In the Jacoby case, which involved a drug store, the court specifically mentioned the one-year time limit and said that the drug store was small and one year was sufficient time within which to liquidate the business.

These cases were criticized in the case of Jones v. Los Angeles, 211 Cal. App. 304, 295 P. 14 (1930), as having been confused with nuisance regulations. In this case, the California court held that an ordinance requiring the immediate removal of several established sanitariums from a residence district was an unconstitutional use of the police power. The ordinance in question was directed at a particular use and allowed no time for amortization of the investment involved. The court in Los Angeles v. Gage recognized the difference in the ordinance in that case which dealt with all nonconforming uses and allowed them to continue for a specified time while the ordinance in question in the Jones case required immediate removal of one particular type of use.

However, an ordinance directed at a particular type

of use was upheld in the *Standard Oil Co. v. City of Tallahassee* 183 F. 2d 410 (1950), cert denied 34 U. S. 892, 71 S. Ct. 208. The ordinance required the removal of gasoline service stations from specified areas of the city by January 1, 1949. Citing the decisions in *Knowles v. Central Alapattae Properties* 145 Fla. 123, 198 So. 819; *State ex rel. Skillman v. City of Miami*, 101 Fla. 585, 134 So. 541; and *State ex rel. Dallas Inv. Co. v. Peace*, 139 Fla. 394, 190 So. 607, the court stated that the power of a municipality to require by ordinance the discontinuance of an existing property use appears to be well established in Florida. The court pointed out that consideration of financial loss or so-called "vested rights" in private property is insufficient to outweigh the necessity for legitimate exercise of the police power of a municipality.

Court decisions involving unusual nonconforming use termination provisions.-- There are several cases in which somewhat unusual provisions concerning nonconforming uses have been brought into court. An ordinance of the County of Los Angeles which rezoned an area from M-3 (unlimited) to M-1 (light manufacturing) contained a provision protecting existing uses as automatic exceptions and allowing them to continue for 20 years, unless such exception should be revoked. Oneway in which an automatic exception could be revoked was for the Regional Planning Commission to find that a nonconforming use is exercised so as to be detrimental to the public health or safety, or so as to

be a nuisance. This ordinance was upheld in *Livingston Rock and Gravel Co. et al. v. County of Los Angeles*, 43 C. 2d 121, 272 P. 2d 4 (1954). In this case a batching plant for the loading of ready mixed concrete trucks with concrete aggregates, which was built as a permissible use before the rezoning, was required to cease operations after the Regional Planning Commission found that it was being exercised in such a manner as to be detrimental to the public health, and so as to be a nuisance.

A provision of the zoning ordinance of the City of Dallas authorized the Board of Adjustment, after public hearing, to require the discontinuance of a nonconforming use under a plan whereby the full value of the structure could be amortized within a reasonable length of time. Under this provision the board of adjustment ordered the removal of a riding stable from a residential district. In the City of Dallas et al. v. Halbert, 246 S. W. 2d 686 (Texas, 1952), the court upheld the jurisdiction of the board in this action. Several Texas cities have similar provisions relating to nonconforming uses. The zoning ordinance of Waco has a provision stipulating:

Any nonconforming use of land or structures may be continued for definite periods of time and subject to such regulations as the Board of Adjustment may require for immediate preservation of the value of adjoining property and the ultimate removal of the nonconforming use.

This type of nonconforming use provision appears to provide no adequate standards and leaves too much to the dis-

cretion of the Board of Adjustment. The owner of a nonconforming use is in constant doubt as to how long he is going to be allowed to stay in business. It appears to be zoning by men and not by law. A similar provision was attacked in the case of *Akron v. Chapman*, 160 Ohio St. 382, 116 N. E. 2d 697 (1953). The City of Akron passed a zoning ordinance in 1922 which provided:

A building existing at the time of the passage of this ordinance, which does not conform to the regulations of the use district in which it is located may remain for a reasonable period and the existing use of such building which portion was arranged or designed for such use at the time of the passage of this ordinance, but a nonconforming use shall not be otherwise extended. A nonconforming use shall be discontinued and removed when, in the opinion of the council, such use has been permitted to exist or continue for a reasonable time.

The city council attempted to remove a nonconforming junk yard which had existed since 1916. At syllabus 3 the court said:

The provisions of a comprehensive zoning ordinance is unconstitutional as taking property without due process of law and as being an unreasonable exercise of the police power, where it grants to the city council discretion to discontinue and remove a lawful nonconforming use of property in a zoned area, which use existed at the time of the passage of the zoning ordinance and continued thereafter without interruption and without material change, when in the council's opinion such nonconforming use has been permitted to continue for a reasonable time.

An interesting provision for the elimination of nonconforming uses was adopted by the City of Moscow, Idaho. On

April 21, 1947, the City adopted a zoning amendment prohibiting the establishment outside the business zone of any new or additional business in which any pool, billiard, card, or dice game is played, or in which draft beer by the drink or liquor by the drink is sold, or in which any coin operated amusement device is maintained or operated. The ordinance states further that "any change of ownership of an existing business of the type herein defined shall be a new or additional business." In holding this provision unconstitutional, *O'Conner et al. v. City of Moscow*, 69 Ida. 37, 202 P. 2d 401 (1949), the court said in part:

A zoning ordinance deals basically with the use, not ownership, of property. The provision in question declaring a change in ownership to be a new business is an arbitrary and unreasonable exercise of the police power and violates the constitutional protection given by the due process clauses.

These are the leading cases dealing with the termination of nonconforming uses. There is a decided lack of accord concerning the power to require the termination of a lawful use existing at the time of the passage of the zoning ordinance; however, the trend appears to be in the direction of a more liberal interpretation of the police power.⁵⁰

⁵⁰For further discussion of this subject see L. S. Tellier, "Zoning-Nonconforming Use-Termination," American Law Reports Annotated, 2nd Series, Vol. 42, 1955, p. 1146-1152.

Purchase or Condemnation

Zoning is an exercise of the police power and not of the power of eminent domain. The only noteworthy effort to zone through the use of eminent domain was in the State of Minnesota where it was found to be impractical. An enabling act was passed in 1921 basing zoning on the police power.

However at the present time it appears that at least two states have provided for the use of eminent domain for the elimination of nonconforming uses. These are Illinois and Michigan. The Illinois statute states:

In addition to all rights and powers conferred by this article the corporate authorities in each municipality have power to acquire by purchase, condemnation or otherwise, any buildings or structures which do not conform to the standards fixed by the corporate authorities pursuant to Section 73-1 (zoning enabling legislation) and all land which is necessary or appropriate for the rehabilitation or redevelopment of any area blighted by substandard buildings or structures; to remove or demolish all substandard buildings and structures so acquired; to hold and use any remaining property for public purposes; and to sell, lease, or exchange such property as is not required for public purposes, subject to the provisions of the existing zoning ordinance. Added by act approved May 3, 1945.⁵¹ (As far as the writer is able to determine, the word substandard as used in this act refers to any building or use which does not meet the standards required by the zoning ordinance.)

In this respect the Michigan statutes provide that:

. . . In addition to the power granted in this section, cities and villages may acquire by purchase,

⁵¹Illinois Revised Statutes, Chapter 24-73-11, 1945.

condemnation or otherwise private property for the removal of nonconforming uses and structures: Provided, the property shall not be used for public housing. The legislative body may in its discretion provide that the cost and expense of acquiring such private property be paid from general funds, or the cost and expense of any portion thereof be assessed to a special district. The elimination of such nonconforming uses and structures in a zoned district as herein provided is hereby declared to be for a public purpose and for a public use. The legislative body shall have authority to instigate and prosecute proceedings for the condemnation of nonconforming uses and structures under the power of eminent domain in accordance with the laws of the state or provisions of any city or village charter relative to condemnation.⁵²

The proposed zoning ordinance for the City of Chicago contains a provision for the use of purchase or condemnation to remove nonconforming uses. This ordinance provides:

- (1) The City of Chicago, at any time by ordinance duly enacted and in accordance with the authority vested in it by Article 73-11 of Chapter 24 of the Statutes of the State of Illinois, (a) may acquire by purchase or condemnation any nonconforming building or structure, all or substantially all of which is designed or intended for a use not permitted in the district in which it is located and all land which is necessary or appropriate for the rehabilitation or redevelopment of the area blighted by such nonconforming use or structure; (b) may remove or demolish all such nonconforming buildings or structures so acquired; (c) may hold and use any remaining property for public purposes; and (d) may sell, lease or exchange such property as is not held for public purposes, subject to the provisions of this ordinance or any amendment hereto.
- (2) No such acquisition by purchase or condemnation shall be made until such time as the Plan Commission, at the request of the City Council, or upon its own

⁵²Michigan Public Acts, Act 272, 1947.

initiative, has made a study of the area within which such nonconforming building or structure is located and has filed a written report on such study with the Committee on Buildings and Zoning of the City Council.⁵³

Several cities in Michigan have provided for the purchase of nonconforming uses. The provision in the Midland zoning ordinance is typical.

In accordance with the provision of Act 272 of the Public Acts of 1947, the Council of the City of Midland may acquire by purchase, condemnation or otherwise private property for the removal of nonconforming uses and structures and may provide that the cost and expense of acquiring such property be paid from general funds, or the cost and expense of any portion thereof be assessed to a special district.

In an attempt to find out if any success was being obtained from the use of this method a questionnaire was sent to several of the cities in Michigan. In response to this inquiry, Mr. Edward Belyea wrote,

In the past, we have attempted to eliminate existing 'Nonconforming Uses' by the city purchase of such property with funds appropriated in the capital improvement fund as 'Neighborhood Improvements'. It was the intention to purchase the 'nonconforming property' and resell to persons interested in developing the property in some conforming use. This method proved quite unsatisfactory as a nonconforming use is in effect a monopoly, and when used as a nonconforming use is quite valuable but is totally unattractive when made to conform.⁵⁴

⁵³Proposed Comprehensive Amendment to the Chicago Zoning Ordinance, October 1955, Article 6, Section 6.4.

⁵⁴Letter from the planning director of Jackson, Michigan, March 26, 1956.

The use of eminent domain to zone, though impractical, was held constitutional in the states where it was tried. The writer located no cases dealing with the elimination of nonconforming uses through the use of eminent domain. The question that would probably arise would be whether this was a public use. There is some doubt as to whether this use of eminent domain would be upheld in some states. In the case of *Adams v. Housing Authority of City of Daytona Beach et al.*, 60 So. 2d 663 (Florida, 1952), the court held unconstitutional the Florida redevelopment legislation authorizing the purchase of private property by eminent domain for resale or lease to private enterprises. Referring to *Standard Oil Company v. City of Tallahassee*, 183 F. 2d 410 (1950), the court said:

If, after notice, the city has the authority to order the discontinuance of a filling station, it would likewise have the power to order the discontinuance of the occupation of houses which are unsafe, unsanitary or breeding grounds for disease, or if desired it could condemn the houses by the process of eminent domain and leave the real estate for the owners to redevelop or use within the limits of a zoning ordinance.

Similarly, the Supreme Court of South Carolina recently held the section of the South Carolina Redevelopment laws which provided for the redevelopment of residential property for commercial and industrial areas through the use of eminent domain to be unconstitutional.⁵⁵

⁵⁵*Edens v. City of Columbia*, 91 S. E. 2d 280 (South Carolina, 1956).

In states such as Florida where the police power is broadly interpreted there is probably no need for the use of eminent domain to remove nonconforming uses. However, as will be discussed in a later section, condemnation may be very desirable in some instances.

Performance Standards

Within the last few years the idea has been advanced that the use of performance standards in zoning could, among other things, reduce the number of nonconforming uses which would need to be eliminated. The idea is that if regulations were established for off-street parking, noise, glare, architectural styles, etc. the owner of the nonconforming use is given an either/or proposition. He can either meet the standards or he can be required to move within a short time because the decision is his own.⁵⁶

Of course, if existing uses were allowed to remain provided they meet specified standards, there would be no justification for excluding a like use which could meet the same standards. There are probably many cities and towns which will never adopt such provisions, but with adequate study, the use of performance standards could very well be

⁵⁶Frank E. Horack, Jr., "Emerging Legal Issues in Zoning", Proceedings of the Annual National Planning Conference, Philadelphia, Pennsylvania, September 26-30, 1954, p. 152.

the ideal answer to the nonconforming use problem for some cities.

This type of regulation is still in a developmental stage and so far as the writer was able to ascertain there is no city which is using performance standards as a method of regulating nonconforming uses. It is suggested that all persons concerned with zoning watch the development of this idea.

CHAPTER IV

RECOMMENDED MEASURES FOR REGULATING NONCONFORMING USES

For a city which is really interested in controlling and eliminating its nonconforming uses, adequate tools are available. The success of such an undertaking is dependent upon how well these tools are used. Zoning is probably the best method for regulating nonconforming uses, but there are several other positive measures which should not be overlooked. These are nuisance regulations, housing and health codes, and deed restrictions. Each of these will be discussed.

Zoning

The zoning provisions relating to nonconforming uses should be clear and specific in order to prevent misinterpretation and misunderstanding. It is recognized that nonconforming use provisions cannot exceed the authorization of the appropriate state enabling legislation, but enabling legislation can be secured if the need is great enough.

The following regulations for nonconforming uses are recommended, the underlying policy being to restrict nonconforming uses and bring them into conformance with the land use plan as soon as possible.

Change of Use

It is suggested that an existing nonconforming use

not be allowed to be changed to any but conforming use. If a use is allowed to be changed to another nonconforming use of the same or higher classification, the owner could continue to change to whatever use was most profitable so long as he did not go to a lower classification. Similarly, a regulation which permitted a change but only to a higher or conforming use would be subject to the same criticism, especially when the nonconforming use was a low classification use at the time it became nonconforming. A regulation which permitted a change to any use that was not a conforming use would seldom be an effective restrictive measure.

If the ordinance prohibited residences in business and industrial districts, additional problems would arise in the case of nonconforming residences if nonconforming uses were allowed to change to any but a conforming use.

Extension

It is recommended that the use of land be restricted to the lot or lots on which it is operating at the time of the passage of the ordinance. In cases where the use of land involves considerable acreage that use could be restricted to an increase of a small percentage over what was actually being used at the time of the passage of the ordinance. Whether or not to permit such an extension and how much extension should be permitted would be questions that would have to be decided depending upon the circumstances involved. "Acreage uses" refers to such operations as quarrying or the removal of sand

and gravel.

In the case of buildings, no enlargement of the building or extension of the use outside the building should be permitted. A nonconforming use may be allowed to occupy all of a structure which was designed for that use. If a person had constructed a building large enough to take care of expansion before the passage of, or amendment to, the ordinance, it would appear unreasonable not to allow him to use the entire building for as long as he remained.

Structural Alteration

No structural alteration should be allowed unless required for structural safety. Structural alteration would be defined as any alteration to outside or load-bearing walls, which would increase the life or substantially change a nonconforming building. This would not affect normal maintenance and repairs.

Discontinuance

A nonconforming use which has been discontinued for 12 consecutive months should not be allowed to be reestablished. This has been held to be a reasonable provision⁵⁷ and could be very effective if properly enforced.

⁵⁷ *Frankmore Realty Corp. v. Le Boeuf et al.*, 104 N. Y. S. 2d 247 (1951); *State ex rel. Harris et al. v. Zoning Board of Appeal and Adjustment et al.*, 221 La. 941, 60 So. 2d. 880 (1952).

Abandonment

There appears to be no reason for including a provision relating to abandonment. Abandonment is usually impossible to prove and at the end of twelve months the discontinuance provision would become operative.

Destruction

A building or other structure which has been destroyed by fire, flood, wind or other act of God or man to more than 50 per cent of the fair market value of the building or structure should not be allowed to be rebuilt as a nonconforming use. Once the nonconformity has been removed it is not unreasonable to require that any future use of the vacant land conform to the requirements of the zoning ordinance.

Compulsory Discontinuance

Compulsory discontinuance, usually referred to as amortization, appears to be the only police power regulation which has been devised for the positive elimination of nonconforming uses.

Provided the enabling legislation is adequate, nonconforming use of land and nonconforming use of conforming buildings may be required to conform to the provisions of the zoning ordinance within two to five years, because the investment is almost certain to be relatively small. The question which is most difficult to answer is how to compel the discontinuance of uses involving nonconforming buildings in which the investment

is usually rather high. Some method must be established to provide a balance between the benefit to the public and the inconvenience caused the individual. It is suggested that the most equitable method is to base the time limitation on the value of the property at the time of the passage of the ordinance. Value is a much more representative measure of the permanency and the investment in the buildings than is the age or the type of the construction. It is recommended that a nonconforming property be allowed to continue after the passage of zoning ordinance for one year for each \$3,000 of value, except that property with a value between \$0 and \$3,000 be allowed to continue for two years. This is illustrated in the table on page 73. Using the market value of the nonconforming property at the time of the passage of the ordinance places all nonconforming property on the same base and gives equal treatment to all.

When residences are prohibited in business and industrial districts, it is suggested that a residence which is occupied by the owner or some member of his immediate family at the time of the passage of the zoning ordinance be exempt from the compulsory discontinuance provision for as long as the residence is owner occupied.

Purchase or Condemnation

Though purchase or condemnation is not practical for the removal of all nonconforming uses, enabling legislation should make this power available for use in special instances.

A nonconforming building which was under construction at the time of the passage of the zoning ordinance and would be of considerable harm to the community if allowed to be completed and used until the compulsory discontinuance provision became effective is an instance in which purchase or condemnation would be effective. Likewise, in the case of a nonconforming use which was in an undesirable location and which would not be eliminated by the compulsory discontinuance provisions for a considerable period of time, eminent domain or public purchase could be used to remove such a use immediately. An example of such a use would be a service station located near a school. Another instance in which purchase or condemnation might be useful is where nonconforming residences are occupied by the owner and are not affected by the compulsory discontinuance provision. This power would be especially useful in rural zoning where it is costly and difficult to provide isolated families with services such as roads and schools. Purchase or condemnation should be used to supplement and not to replace police power regulations.

In order that the power to purchase or condemn nonconforming uses will be available to legislative bodies, the following enabling legislation is suggested:

In addition to the regulation of nonconforming uses under the police power, the legislative body of any city, town, or county, upon a written statement of public purpose and recommendation from the

planning commission setting forth the benefit to the public which will result from the immediate elimination of a nonconforming use, may acquire by purchase, condemnation or otherwise, private property for the removal of nonconforming uses of land, buildings, or structures; remove or demolish any buildings or structures so acquired; hold and use any property so acquired for public purposes; or sell, lease or exchange such property subject to the provisions of the zoning ordinance. The legislative body shall have authority to institute and prosecute proceedings under the power of eminent domain for the condemnation of nonconforming uses of land, nonconforming buildings and structures and the land on which they are located, or nonconforming buildings and structures only. The legislative body may provide that the cost and expense of acquiring such private property be paid from the general fund of the city, or the cost and expense or any portion thereof be assessed to a special district.

Partial Compensation for Reduced Value

For a city which is interested in the immediate removal of nonconforming uses a system of partial compensation might be effective in many cases. As distinguished from the purchase of the property, under a compensation plan the city would not acquire title to the property. Under this

plan the city would enter into a contract with the property owner stipulating that the city would compensate him for the difference between the fair market value of his property for a nonconforming use for the time remaining before he would be required to cease operations and its fair market value for a conforming use, provided he agree to the immediate removal of the nonconforming use.

Used in conjunction with police power regulations requiring compulsory discontinuance such a provision could be very effective. For example, if the fair market value of a nonconforming use at the time of the passage of the zoning ordinance was \$24,000, using the table on page 73, it would be allowed to continue for nine years. If the fair market value of the property for a conforming use was \$3,000, and the city wanted to remove the use three years after the passage of the zoning ordinance, the city could offer the property owner the difference of \$21,000 minus \$8,000 for the three years the nonconforming use had existed or a total of \$13,000. This offer of compensation for reduced value would be very tempting to a property owner who knew that if he did not accept such a settlement the nonconforming use would eventually be removed under the police power with no compensation at all. However, if the property owner was not agreeable to such a plan, the city could permit the use to continue until it was required to cease under the provision for compulsory discontinuance, or the city might be able to condemn the property

under the power of eminent domain.

The use of this type of provision should have some restriction. It is recommended that before a nonconforming use is eliminated by compensation the planning commission submit a written report to the city council specifying in detail the advantages to the public of securing the elimination of the nonconforming use and recommending that partial compensation be paid to accomplish immediate elimination of the use. Thereafter, the city council could authorize the partial compensation for the nonconforming use.

It is recommended that the following provision be included in state enabling legislation to authorize partial compensation for the immediate removal of nonconforming uses:

In addition to all other regulations pertaining to nonconforming uses, the legislative body of any city, town, or county, upon a written statement of public purpose and recommendation from the planning commission setting forth the benefits to the public which will result from the immediate elimination of a nonconforming use, may, by ordinance, provide partial compensation for reduced value to the owner of a nonconforming use in an amount equal to the difference between the fair market value of his property for its existing nonconforming use and the fair market value of his property for a conforming use, provided the nonconforming use shall be discontinued immediate-

ly upon such compensation being paid. The determination of the fair market value of the nonconforming use shall take into account the number of years remaining before the use shall be required to be eliminated under the compulsory discontinuance provisions of the zoning ordinance. The legislative body may provide that such compensation be paid from the general fund of the city, or that all or any portion of such compensation be assessed to a special district. Provided, that this power shall not be used by any legislative body which has not enacted a zoning ordinance or amendment which provides for the compulsory discontinuance of all nonconforming uses within a specified time.

If there is a need for the immediate elimination of a nonconforming use, the power to provide for partial compensation could be very useful. As far as the writer is able to determine, this type of provision has never been used to eliminate nonconforming uses, but it appears to be a reasonable provision which is worth considering.

Model Nonconforming Use Provisions

In light of the above recommendations the following nonconforming use provisions are suggested. These are intended only as a guide and would have to be modified to meet the needs of each community. In many states additional zoning enabling legislation would be necessary before many of these

provisions could be placed in a zoning ordinance.

Lawful nonconforming uses existing at the time of the passage of this ordinance may be continued subject to the following provisions:

Sec. 1: Change of use.-- A nonconforming use shall not be changed to any but a conforming use. When a nonconforming use has been changed to a conforming use it shall not be changed again to any nonconforming use.

Sec. 2: Extension.-- A nonconforming use of land shall be restricted to the lot or lots occupied by such use at the time of the passage of the ordinance or amendment thereto. A nonconforming use of land for quarrying shall be restricted to the tract owned or leased by the corporation, partnership, or individual at the time of the passage of the ordinance. Such operations may be extended to include the entire tract or 25 per cent more area than was in actual use for quarrying purposes at the time of the passage of the ordinance, whichever is smaller.

A nonconforming building shall not be enlarged nor extended, except that the nonconforming use of a building designed for that use may be extended to occupy the entire building.

Sec. 3: Structural alteration.-- A nonconforming building shall not be structurally altered. This provision

shall not be construed to prevent normal maintenance and repairs or alterations required for structural safety.

Sec. 4: Discontinuance.-- When a nonconforming use has been discontinued for a period of twelve months, any future use shall conform to the requirements of this ordinance.

Sec. 5: Destruction.-- A building which is damaged by fire, flood, wind, or other act of God or man to more than 50 per cent of its fair market value shall not be reconstructed except in conformity with the provisions of this ordinance.

Sec. 6: Compulsory discontinuance.-- The nonconforming use of land shall be discontinued within two (2) years after the passage of this ordinance or two (2) years after an amendment which makes the use nonconforming.

The nonconforming use of a conforming building shall be discontinued within five (5) years after the passage of this ordinance or five (5) years after an amendment which makes the use nonconforming.

A nonconforming building or structure shall be discontinued after the passage of this ordinance or an amendment thereto, within the time required by the following schedule which is based on the fair market value of the nonconforming property. The fair market

value shall be computed from the assessed valuation for tax purposes at the time buildings or structures become nonconforming.

Provided, that a nonconforming residence shall be exempt from this section so long as such residence is occupied by the owner or some member of his immediate family.

0 to \$ 3,000 - 2 yrs	\$36,001 to \$39,000 - 14 yrs
\$ 3,001 to \$ 6,000 - 3 yrs	\$39,001 to \$42,000 - 15 yrs
\$ 6,001 to \$ 9,000 - 4 yrs	\$42,001 to \$45,000 - 16 yrs
\$ 9,001 to \$12,000 - 5 yrs	\$45,001 to \$48,000 - 17 yrs
\$12,001 to \$15,000 - 6 yrs	\$48,001 to \$51,000 - 18 yrs
\$15,001 to \$18,000 - 7 yrs	\$51,001 to \$54,000 - 19 yrs
\$18,001 to \$21,000 - 8 yrs	\$54,001 to \$57,000 - 20 yrs
\$21,001 to \$24,000 - 9 yrs	\$57,001 to \$60,000 - 21 yrs
\$24,001 to \$27,000 - 10 yrs	\$60,001 to \$63,000 - 22 yrs
\$27,001 to \$30,000 - 11 yrs	\$63,001 to \$66,000 - 23 yrs
\$30,001 to \$33,000 - 12 yrs	\$66,001 to \$69,000 - 24 yrs
\$33,001 to \$36,000 - 13 yrs	\$69,001 or more - 24 yrs plus one year for each additional \$3,000 value.

Sec. 7: Purchase or condemnation.-- In addition to the regulations set forth in Sections 1 through 6, the city council upon a written statement of public purpose and recommendation from the planning commission setting forth the benefits to the public which will result from the

immediate elimination of a nonconforming use, may acquire by purchase, condemnation or otherwise, private property for the removal of nonconforming uses of land, buildings, or structures; remove or demolish any buildings or structures so acquired; hold and use any property so acquired for public purposes; or sell, lease or exchange such property subject to the provisions of this ordinance. The city council may provide that the cost and expense of acquiring such private property be paid from the general fund of the city, or the cost and expense or any portion thereof be assessed to a special district.

Sec. 8: Partial compensation for reduced value.-- In addition to all other regulations pertaining to nonconforming uses, the city council, upon a written statement of public purposes and recommendation from the planning commission setting forth the benefits to the public which will result from the immediate elimination of a nonconforming use, may, by ordinance, provide partial compensation for reduced value to the owner of a nonconforming use in an amount equal to the difference between the fair market value of his property for its existing nonconforming use and the fair market value of his property for a conforming use, provided the nonconforming use shall be discontinued immediately upon such compensation being paid. The

determination of the fair market value of the nonconforming use shall take into account the number of years remaining before the use shall be required to be eliminated under the compulsory discontinuance provisions of this ordinance. The city council may provide that such compensation be paid from the general fund of the city, or that all or any portion of such compensation be assessed to a special district.

Zoning Administration

The best written and most well thought out set of regulations will be of no value in the control and elimination of nonconforming uses unless properly administered. It is very important that persons administering the zoning ordinance understand its principals. This is illustrated by a note on a questionnaire returned to the writer by the Director of Planning in Moline, Illinois. The note read:

The general subject of nonconforming uses is found to be one of the most complex and least understood phases of zoning, and even the zoning administrators need to be reminded that the aim should be to eliminate these uses.

In order to administer nonconforming use provisions it is necessary to know where the nonconforming uses are located, what type uses they are, and when they are to be discontinued. In connection with the regulations outlined above it is suggested that after the zoning ordinance has been adopted

a map showing the location of all nonconforming uses be drawn. Keyed to this map a card should be set up for each of these uses which would contain information as to the location, type, extent of the use, value, and the date by which it shall be terminated.

The zoning administrator could then utilize this record to notify each owner and operator of nonconforming property of the date by which it must be terminated and of the requirement of a certificate of occupancy. It is also suggested that the building inspector again give the owner and operator of a nonconforming use notice of the date by which it must be removed six months prior to the expiration date.

It is also recommended that the owner of a nonconforming use be required to renew the certificate of occupancy each year. The occupancy permit should state that the use is a nonconforming use and indicate the date by which the use must be discontinued. This would enable the zoning administrator to keep a constant check on nonconforming uses and a charge for the certificate of occupancy would help defray the cost of administration.

No city should adopt the proposed nonconforming use provisions outlined above unless it is prepared to administer and enforce them properly. Halfhearted administration and enforcement is worse than none at all. It is almost certain to lead to unfairness which is likely to incur the wrath of the

courts, the effects of which would be felt by cities which were administering their regulations properly.

Other Positive Measures

Although nonconforming uses are created by zoning, there are several regulations other than zoning which might be helpful in the elimination of some nonconforming uses. These include nuisance regulations, housing and health codes, and deed restrictions.

Nuisance Regulations

In attempting to eliminate nonconforming uses the city should not overlook the possibility of using nuisance regulations. If a nonconforming use can be classified as a nuisance, either public or private, it is not necessary to wait for the provisions of the zoning ordinance to remove such a use. As a nuisance it can be removed immediately without compensation.

Housing and Health Codes

These regulations would be valuable tools for the elimination of nonconforming residences which were substandard and unsanitary. The health code could also be invoked to force an operation which created a health menace to nearby areas to either clean up or move out. These regulations should not be overlooked when seeking a method to eliminate nonconforming uses.

Deed Restrictions

This is another possibility which should be taken into consideration. The courts have held that a vested interest cannot be obtained in a nonconforming use which violates a private restriction.⁵⁸ Depending upon the wording of the restriction, it is possible that a nonconforming use which is in violation of a private deed restriction might be terminated immediately upon action by a property owner who was a party to the restriction.

Assessment

In addition to the above mentioned positive measures for the control and elimination of nonconforming uses, a high tax assessment might make it more profitable for a nonconforming use to relocate in a permitted district.

A nonconforming business is usually a valuable and profitable operation due to its monopolistic position. Therefore, the actual value of such a use may be higher than the actual value of the same use located in a permitted district which was in close proximity to uses of the same kind. This possibility should not be overlooked by the tax assessors. This high actual value could result in higher taxes for a nonconforming business than the same business would have to pay if it were located in a permitted district. These increased taxes could be influential in a decision to relocate a business

⁵⁸Larson v. Howland et al., 108 N. Y. S. 2d 231 (1951).

in an approved district. The case of Northside Laundry Company v. Board of Property Assessment, Appeals and Review⁵⁹ does not exactly illustrate this point but the reasoning is along the same lines. In this case the owner of a nonconforming business sought relief because his property reflected a higher tax per square foot than adjoining residential property. The court held that as long as the same standard of actual value was used to arrive at the tax assessment, the difference was justified.

⁵⁹168 P. Super. 495, 79 A. 2d 215 (1951).

CHAPTER V

CONCLUSION

Nonconforming uses do not present an insurmountable problem. If the objective of an orderly and planned community is kept in mind, nonconforming uses can be approached on the basis that the elimination of these uses is in the interest of the general public. This is the only justification for the regulation of private property.

It has been suggested that the stronger the nonconforming use provisions of the zoning ordinance, the less the zoning ordinance will reflect the areas established by the future land use plan.⁶⁰ There is no reason why this should be true. If this is necessary, there is something basically wrong with the land use plan on which the zoning ordinance is based. It is submitted that the strength of the nonconforming use provisions will be dependent on solutions to the related problems of use variances, spot zoning, and overzoning mentioned earlier and on the basic validity of the land use plan on which the entire zoning ordinance is based.

The nonconforming use provision of the zoning ordinance must be designed to fit the needs of the particular locality they are to serve. The nonconforming use problem of one city

⁶⁰Dennis O'Hare, "The Dilemma of the Nonconforming Use," American Society of Planning Officials Newsletter, Vol. 22, No. 1, January 1956, p. 1.

may be completely different from that of another. The primary test of any zoning regulation is that it must be reasonable. A regulation which is reasonable in one locality may be completely unreasonable in another. It has been said by the court that:

. . . the extent of the reasonable exercise of the police power varies directly with the degree of the density of the population in the city, town, or village involved. An ordinance which might be considered reasonable if enacted in New York City, could be considered completely unreasonable if enacted in a smaller political subdivision. . . . A definition of reasonableness cannot be made for all occasions and must, of necessity, be considered anew in the light of each problem presented.⁶¹

Public understanding of the objectives and benefits of zoning will do a great deal to further the acceptance of all zoning regulations. Regardless of how good any zoning provision may be in theory, if it does not have the support of the people of the community it will fail.

This has been an effort to set forth and discuss the problem of nonconforming uses and suggest possible methods which might be used to bring about the control and elimination of these uses. This study is only a start. This is a problem which does not have a single solution. Additional thought and research will undoubtedly uncover more and better methods for dealing with nonconforming uses.

⁶¹Town of Somers v. Camero et al., 308 N. Y. 537, 127 N. E. 2d 327 (1955).

List of Abbreviations

Ark.	Arkansas Reports
A.	Atlantic Reporter
A. 2d	Atlantic Reporter, Second Series
Cal.	California Reports
Cal. App.	California Appellate Reports
Conn.	Connecticut Reports
F.	Federal Reporter
Fla.	Florida Reports
Ga.	Georgia Reports
Ida.	Idaho Reports
Ill.	Illinois Reports
Ky.	Kentucky Reports
La.	Louisiana Reports
Mass.	Massachusetts Reports
Mich.	Michigan Reports
N. J. Super.	New Jersey Superior Reports
N. Y.	New York Court of Appeals Reports
N. Y. S.	New York Supplement Reporter
N. E.	Northeastern Reporter
N. W.	Northwestern Reporter
Ohio St.	Ohio State Reports
P.	Pennsylvania State Reports
P. Super.	Pennsylvania Superior Court Reporter
R. I.	Rhode Island Reports

S. E.Southeastern Reporter
So.Southern Reporter
S. W.Southwestern Reporter
S. Ct.Supreme Court Reporter
U. S.United States Reports

A N N O T A T E D

B I B L I O G R A P H Y

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